IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. .....

CHARLES B. VAN DUSEN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

I.

Opinions of the Courts Below.

The United States Board of Tax Appeals entered its

Memorandum Findings of Fact and Opinion in this case on June 20, 1942. Said Memorandum Findings of Fact and Opinion were not reported. The opinion of the Board upheld the contentions of petitioner and no dissenting opinion was filed. On October 18, 1943, the United States Circuit Court of Appeals for the Sixth Circuit entered a judgment reversing the decision of the Board of Tax Appeals and remanding the case to the Board for entry of decision. The United States Circuit Court of Appeals did not enter any opinion in this cause and its judgment is reported in 138 Fed. (2d) 510.

II.

Statement As to the Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938), 28 U. S. C. 347, and June 7, 1934 (48 Stat. 926).

III.

Statement of the Case.

On February 26, 1931, Charles B. Van Dusen, the petitioner herein, created an irrevocable trust known as "The Charles B. Van Dusen Insurance Trust," to which he transferred certain securities and certain life insurance

policies owned by him and issued on the life of his wife (R. 28). A portion of the income of the trust was used during the years 1936, 1937 and 1938, to pay premiums on these policies (R. 28). Upon the transfer of said securities and insurance policies in trust, the petitioner completely relinquished all rights of ownership and economic benefits therein and retained no reversionary interest in any part of the corpus of the trust whether the original corpus or accumulations added thereto. The petitioner was not a trustee of the trust and retained no powers with respect to its control or management (R. 30-42). The only interest petitioner, as grantor, had in the trust was that, in the event his wife predeceased him, he became entitled to one-half of the net income received by the trust, subsequent to that event. The trust was irrevocable, not subject to amendment, and continued throughout the lifetime of the grantor and until remaindermen, the grantor's children, attained specified ages (R. 30-42).

In notices of deficiency relating to the three said years, 1936, 1937 and 1938, the Commissioner of Internal Revenue determined that the income of the trust used to pay insurance premiums was taxable to petitioner as grantor of the trust. Petitioner appealed from these determinations to the United States Board of Tax Appeals which, in a Memorandum Findings of Fact and Opinion entered on June 20, 1942, sustained petitioner's contention that he was not subject to tax in respect to the trust income used to pay insurance premiums. The Commissioner of Internal Revenue appealed from the decision of the Board to the United States Circuit Court of Appeals for the Sixth Circuit, which, on October 18, 1943, without an opinion, entered a judgment reversing the decision of the Board of Tax Appeals and remanding the case to the Board for entry of decision.

IV.

ARGUMENT.

1. The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that the income of an insurance trust used to pay premiums on life insurance policies not on the life of the grantor is taxable to the grantor, in conflict with a decision of the United States Circuit Court of Appeals for the Fifth Circuit.

The judgment of the United States Circuit Court of Appeals for the Sixth Circuit in the instant proceeding, holding that income of The Charles B. Van Dusen Insurance Trust used to pay premiums on life insurance policies on the life of the grantor's wife was taxable to him, is in conflict with decisions of the United States Board of Tax Appeals in other cases and the decision of the United States Circuit Court of Appeals for the Fifth Circuit in the case of *Commissioner of Internal Revenue v. Amy B. Jergens*, 127 Fed. (2d) 973 (affirming the Memorandum Opinion of the Board of Tax Appeals entered May 28, 1941). In the *Jergens* case the taxpayer had created a trust to which she had transferred certain securities, together with life insurance policies on the life of her husband. The trust agreement provided that the income of the trust should be used, first, to pay the premiums on the life insurance policies and a small annuity to a named beneficiary. Any remaining net income was to be paid to the taxpayer during her lifetime. The taxpayer's husband, the insured under the policies, was given the right to withdraw any part of the corpus at any time,

except the policies themselves, and the power to alter, modify or amend the trust agreement. The trust was to terminate upon the death of the taxpayer with the corpus distributable to her husband, if living, and otherwise, to her issue and other beneficiaries. Upon reviewing these facts the Board of Tax Appeals decided that the income of the trust used to pay the insurance premiums was not taxable to the grantor under any provision of Section 167(a) of the Revenue Acts of 1936 and 1938. It held that Section 167(a)(3) explicitly provides that the grantor shall be taxable on the income of a life insurance trust used to pay premiums on policies of life insurance on his *own* life and was therefore inapplicable. On appeal the United States Circuit Court of Appeals for the Fifth Circuit affirmed the Board and held that the income in question was not taxable to the grantor under any provision of Section 167(a) and, further, that it was not taxable to the grantor under Section 22(a). The Court determined that the grantor had retained no economic interest in the policies in question.

The facts in the instant proceeding are identical with the facts in the *Jergens* case in all material respects. In both cases the grantor had established a funded life insurance trust which provided that the income was to be used as far as necessary to pay premiums on life insurance policies *not* on the life of the grantor. In the *Jergens* case any excess income was payable to the grantor. In the instant case such excess income was payable to the grantor only at the discretion of the trustees who had an interest adverse to the grantor. (Here the excess income of the trust was not in fact distributed and the Commissioner of Internal Revenue does not seek to tax it to the grantor.) After the death of the insured the entire income of the *Jergens* trust was payable to the grantor whereas

under similar circumstances one half of the income of the Van Dusen Trust was payable to the grantor. Various powers to withdraw corpus and to alter, amend, and revoke were lodged by the grantor of the *Jergens* trust in her husband, but no such powers were retained by the grantor or given to his wife or any other person in the instant case. In so far as the application of Section 167(a) is concerned, the facts of the *Jergens* case and the instant case are indistinguishable. Neither did the grantor of either trust retain any economic benefits which would subject him to taxation under Section 22(a) although in the *Jergens* case certain powers were lodged by the grantor in her spouse, which was not true in the Van Dusen Trust.

It is therefore apparent that the judgment of the United States Circuit Court of Appeals for the Sixth Circuit is in direct conflict with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in the *Jergens* case. This judgment is likewise in conflict with the decisions of the United States Board of Tax Appeals in the cases of *Lucy A. Blumenthal*, 30 B. T. A. 591 (reversed on another issue, 296 U. S. 552), and *Gail H. Baldwin*, 36 B. T. A. 364.

2. The United States Circuit Court of Appeals for the Sixth Circuit erred in determining that petitioner is subject to tax on the income of a trust used to pay premiums on life insurance policies not on his life, under Section 167(a) of the Revenue Acts of 1936 and 1938.

In its judgment issued in this proceeding the United States Circuit Court of Appeals for the Sixth Circuit determined that petitioner was taxable on the income of The Charles B. Van Dusen Insurance Trust under Section 167(a) of the Revenue Acts of 1936 and 1938, despite the fact that the insurance policies in the trust were not on the life of the petitioner. Section 167(a) provides as follows:

> "(a) Where any part of the income of a trust—
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> (1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or
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> (2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; or
>
> (3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in section 23(o), relating to the so-called 'charitable contribution' deduction);

then such part of the income of the trust shall be included in computing the net income of the grantor."

Since the income of the trust here in question was used to pay insurance premiums, it is apparent that such income was neither distributed to the grantor nor held or accumulated for future distribution to him. Clauses (1) and (2) of the quoted statute are therefore inapplicable. Clause (3) is inapplicable by its very terms since it applies only to portions of trust income used to pay premiums upon policies of insurance on the life of the grantor. The policies owned by The Charles B. Van Dusen Trust were on the life of the grantor's spouse. It is apparent, therefore, that Section 167(a) is not applicable to the facts of this proceeding and that the United States Circuit Court of Appeals for the Sixth Circuit is in error in so determining. That Section 167(a) is inapplicable to trusts of this type was decided, not only by the United States Board of Tax Appeals in its decision in the instant proceeding, but by the same tribunal in the cases of *Lucy A. Blumenthal, supra*, and *Gail H. Baldwin, supra*, and by the Circuit Court of Appeals for the Fifth Circuit in the case of *Commissioner of Internal Revenue v. Amy B. Jergens, supra*.

3. The United States Circuit Court of Appeals for the Sixth Circuit erred in determining that petitioner is subject to tax on the income of a trust under Section 22(a) of the Revenue Acts of 1936 and 1938 in the absence of any finding that he retained any economic interest in such trust.

The United States Board of Tax Appeals had before it the question of whether petitioner was subject to tax on the income of The Charles B. Van Dusen Trust under Section 22(a) of the Revenue Acts of 1936 and 1938. However, the Board did not determine that petitioner was subject to tax under this section nor did it make any findings of fact which would support such a conclusion. The record in this proceeding makes it clear that the trust in question was a long-term trust which continued throughout the lifetime of the grantor and until his children attained the age of forty (40) years; that the income in question was not distributable either to the grantor or to any member of his family; that the grantor was not a trustee and that he retained no elements of control whatsoever over the management and operation of the trust. Moreover, the findings of fact of the United States Board of Tax Appeals are bare of any suggestion that the grantor in the instant case retained for himself, or could derive from the operation of the trust, any economic benefit whatsoever. The fact that the grantor's wife created a similar insurance trust does not alter this conclusion, since he was not a beneficiary of his wife's trust. These were not reciprocal or cross trusts, since neither spouse could derive any benefit from the trust set up by the other. Nevertheless, the United States

Circuit Court of Appeals for the Sixth Circuit, in the absence of any facts of record or any findings of fact by the Board supporting such a conclusion, held that the income of the trust was taxable to the grantor under Section 22(a).

Aside from the procedural error involved in such a determination, it is submitted that the Circuit Court of Appeals for the Sixth Circuit in its decision has attempted to extend the application of the principle laid down by this Court in the case of *Helvering v. Clifford*, 309 U. S. 331, far beyond any limits contemplated by this Court. In the *Clifford* case this Court held that the income of a short-term trust was taxable to the grantor where he retained control by making himself the trustee, where the income was distributable to his wife and therefore available for use "within an intimate family group," and where the corpus was to revert to him upon termination. It is apparent that the extension of what has come to be known as the "Clifford principle" to trusts of the type present in the instant proceeding threatens to impose upon the grantors of family trusts tax liabilities never contemplated by the Congress in the enactment of the Revenue Statutes, nor, it is respectfully submitted, by this Court in the decision of the *Clifford* case. If the grantor of a trust is to be taxed upon the income thereof despite the fact that the trust continues throughout his lifetime, that the income cannot be used by him or for his benefit or be distributed to any member of his family for current use within the family group and despite the further fact that he has divorced himself completely from the control of the trust, then, in effect, the creation of trusts for the benefit of grantors' children or other members of their families will, in practice, be made impossible.

Finally there has developed among the Circuit Courts of Appeal variations in the interpretation of the decision of this Court in the *Clifford* case which have resulted in widely differing applications of the Clifford principle in different parts of the country. This fact was recognized by the Circuit Court of Appeals for the Seventh Circuit in *Commissioner of Internal Revenue v. Katz*, decided November 24, 1943, which stated:

> "We think it would be well near useless to attempt to analyze the cases which have sought to apply or distinguish the doctrine of the *Clifford* case, and we shall not do so. It appears from such cases that there is some contrariety of opinion as to the extent to which the doctrine of that case should be given effect."

In the instant case the Circuit Court of Appeals for the Sixth Circuit has applied Section 22(a) to a situation where it seems clear that the Circuit Court of Appeals for the Seventh Circuit would have found it inapplicable. This "contrariety" of opinion among the Circuit Courts of Appeals results in the imposition of discriminatory burdens upon the grantors of trusts living in certain parts of the United States.

4. The United States Circuit Court of Appeals for the Sixth Circuit erred in reversing the decision of the United States Board of Tax Appeals without analysis or criticism of the Board's findings of fact, without the finding of additional facts supporting its own judgment and without specification of errors of law in the Board's opinion.

In this proceeding the United States Board of Tax Appeals entered a Memorandum Findings of Fact and Opinion in which the Board analyzed the provisions of The Charles B. Van Dusen Insurance Trust. The Board found, as a fact, that the trust in question was not a short-term trust, that its income was not currently distributable to the grantor and could not be accumulated for future distribution to him and that no part of the income of the said trust had ever been distributed to him or to any other person. The Board did not find that the grantor retained any control over the trust of which he was not one of the trustees, that he retained any reversionary interest in the corpus or income thereof or that he enjoyed any economic benefit of any kind as a result of the creation of the trust, although the application of Section 22(a) of the Revenue Act of 1938 was an issue in this proceeding. The United States Circuit Court of Appeals for the Sixth Circuit entered its judgment reversing the Board without any opinion analyzing the findings of fact entered by the Board and without finding any additional facts. Nevertheless, the Court ruled as a conclusion of law that the income of the trust was taxable to the grantor under Section 22(a), a result which, it is submitted, is erroneous and improper in the absence of any factual determination supporting the proposition that the grantor retained any interest or advantage from the

trust. In similar cases, other Circuit Courts of Appeal have declined to review the finding of fact of the trial Court that the grantor retained no economic benefit warranting taxation under Section 22(a). See *Commissioner of Internal Revenue v. Katz*, decided by the United States Circuit Court of Appeals for the Seventh Circuit on November 24, 1943. Furthermore, the United States Circuit Court of Appeals for the Sixth Circuit reversed the determination of the Board that the income of the trust in question was not taxable to the grantor under Section 167(a) without any opinion specifying the errors of law, if any, committed by the Board in reaching its result.

The Court accordingly erred in basing its judgment on a conclusion which is not supported by any facts of record and is not supported by any facts found by the tribunal below. Moreover, the reversal of the decision of the United States Board of Tax Appeals by the United States Circuit Court of Appeals for the Sixth Circuit, without the entry of any opinion analyzing the facts and the principles of law relied upon by the Court below, is contrary to sound and established judicial procedure of appellate tribunals. It is recognized that in affirming a lower Court, an appellate Court is not required to issue a written opinion. Here, however, the lower Court was reversed by the appellate authority. This Honorable Court has recognized the impropriety of a judicial tribunal reversing a quasi judicial administrative body without a statement of the grounds of its decision, both as to the facts and the law. *Public Service Commission of Wisconsin v. Wisconsin Telephone Company*, 289 U. S. 67; *Railroad Commission of Wisconsin v. Maxcy*, 281 U. S. 82.

The failure of the United States Circuit Court of Appeals for the Sixth Circuit to find facts supporting its conclusion and to explain the basis of its reversal of the decision of the Board constitutes a serious and unwarranted departure from the usual course of judicial proceedings.

WHEREFORE, in the light of the foregoing reasons, it is respectfully urged that the petition of Charles B. Van Dusen for writ of certiorari filed herewith be granted by this Honorable Court.

Respectfully submitted.

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